

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Broadnet Teleservices LLC	)	
Petition for Declaratory Ruling	)	
	)	
National Employment Network Association	)	
Petition for Expedited Declaratory Ruling	)	
	)	
RTI International	)	
Petition for Expedited Declaratory Ruling	)	

**OPPOSITION OF RTI INTERNATIONAL TO  
PETITION FOR RECONSIDERATION**

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**I. INTRODUCTION AND SUMMARY.**

RTI International (“RTI”) respectfully submits this opposition to the National Consumer Law Center *et al.*’s (“NCLC”) petition for reconsideration of the Federal Communications Commission’s (“FCC” or “Commission”) July 5, 2016 *Declaratory Ruling* in the above-captioned proceeding.<sup>1</sup> As explained below, the clarification that NCLC has challenged is fully within the Commission’s authority and amply supported by a comprehensive record developed through multiple requests for comment over nearly two years. NCLC fails entirely to identify any compelling legal or policy reason to reconsider the *Declaratory Ruling* or explain why it did not participate earlier in this proceeding.

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<sup>1</sup> See NCLC *et al.* Petition for Reconsideration of Declaratory Ruling and Request for Stay Pending Reconsideration, CG Docket No. 02-278 (filed July 26, 2016) (“NCLC Petition”); Consumer and Governmental Affairs Bureau Seeks Comment on National Consumer Law Center Petition for Reconsideration of the FCC’s Broadnet Declaratory Ruling, Public Notice, DA 16-878 (CGB rel. Aug. 1, 2016); see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Broadnet Teleservices LLC Petition for Declaratory Ruling; National Employment Network Association Petition for Expedited Declaratory Ruling; RTI International Petition for Declaratory Ruling, Declaratory Ruling, 31 FCC Rcd 7394 (2016) (“*Declaratory Ruling*”).

On July 5, 2016, the Commission clarified that the TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except in cases where a contractor does not comply with the government’s instructions.<sup>2</sup> After failing to participate at any point in the two-year proceeding, NCLC now asks the Commission to reconsider this decision.<sup>3</sup> In an effort to provide support for its request, NCLC grossly exaggerates the *Declaratory Ruling’s* impact. NCLC also misconstrues the text of the TCPA, the Supreme Court’s recent decision in *Ewald Co. v. Gomez*, and the relationship between that decision and the *Declaratory Ruling*.<sup>4</sup>

The Commission should not reconsider the *Declaratory Ruling*. The FCC’s clarification is supported by the plain language of the TCPA and decades of Supreme Court precedent, which establish that statutes that use the term “person” are construed to exclude the federal government absent a clear, affirmative showing of Congressional intent to the contrary.<sup>5</sup> The clarification is also supported by the FCC’s longstanding precedent of interpreting the TCPA to exempt from liability calls placed on behalf of a principal that would not have been liable if it had placed the calls itself.<sup>6</sup> Importantly, it would be entirely unreasonable to allow contractors placing *telemarketing* calls on behalf of a private sector company to rely on that company’s established business relationships and other caller “benefits” while prohibiting the federal government from similarly sharing its “benefits” with the same call center contractors for non-marketing research surveys, tele-town halls, and other important government calls.

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<sup>2</sup> See *Declaratory Ruling*.

<sup>3</sup> See NCLC Petition at 2.

<sup>4</sup> See *id.*; *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

<sup>5</sup> See, e.g., *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979).

<sup>6</sup> See, e.g., *Declaratory Ruling* ¶ 17.

In addition, the Bipartisan Budget Act's amendments to the TCPA are also consistent with the *Declaratory Ruling*, as the Commission has now explained on multiple occasions.<sup>7</sup> The exemptions created by the Bipartisan Budget Act apply based on the purpose of the call, whereas the Commission's clarification applies based on the relationship between the caller and the federal government. Also, Congress created the exemptions before the *Declaratory Ruling* was released, which means that they were not redundant or pointless.

The *Declaratory Ruling* also advances the public interest and will benefit the federal government and consumers. The federal government and contractors who call on its behalf must be able to call wireless phones to ensure that government research, funding, and policies benefit citizens as intended. Meanwhile, its use of advanced calling technologies and contractors to place calls is cost-effective, efficient, and consistent with sound federal policy.

## **II. THE PETITION SHOULD BE DISMISSED BECAUSE NCLC HAS NOT SHOWN GOOD CAUSE FOR ITS FAILURE TO PARTICIPATE IN THE UNDERLYING PROCEEDING.**

The Commission's rules require any petitioner seeking reconsideration of a decision in a proceeding that she was not a part of to show good cause "why it was not possible" to participate earlier in the proceeding.<sup>8</sup> NCLC does not even allege that it or any other party was unable to participate earlier in this proceeding.<sup>9</sup> Instead, NCLC claims only that it could not have foreseen the proceeding's outcome despite the Commission's solicitation of public comment on this issue three times in the past two years.<sup>10</sup>

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<sup>7</sup> See, e.g., *id.* ¶ 21 n.96.

<sup>8</sup> 47 C.F.R. § 1.106(b)(2).

<sup>9</sup> See NCLC Petition at 6-9.

<sup>10</sup> See *id.*

NCLC had ample warning that the Commission was considering whether calls by or on behalf of the federal government were subject to the TCPA. Three separate parties filed three separate petitions raising this specific issue: RTI; Broadnet Teleservices LLC (“Broadnet”); and the National Employment Network Association (“NENA”).<sup>11</sup> The Commission sought comment on these petitions on three separate occasions and plainly stated that it was considering the issues addressed in the *Declaratory Ruling*.<sup>12</sup> For example, in November 2014, the Commission asked whether the TCPA applies to calls “by or on behalf of the federal government” when it sought comment on RTI’s petition.<sup>13</sup> RTI’s petition expressly asked the FCC to clarify that calls by or on behalf of the government, including calls by a contractor, were not subject to the TCPA.<sup>14</sup> Likewise, in September 2015, the Commission asked whether “calls made by or on behalf of government entities, including . . . those working on behalf of government entities and officials, are [s]ubject to the TCPA” when it sought comment on Broadnet’s petition.<sup>15</sup> Then, on March 14, 2016, the Commission announced that an item addressing these petitions was circulated for a vote.

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<sup>11</sup> See RTI International Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Sep. 29, 2014) (“RTI Petition”); Petition of Broadnet Teleservices LLC for Declaratory Ruling, CG Docket No. 02-278 (filed Sep. 16, 2015); National Employment Network Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 19, 2014).

<sup>12</sup> See *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by RTI International*, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 13916 (CGB 2014) (“RTI Public Notice”); *Consumer and Governmental Affairs Bureau Seeks Comment on a Petition for Declaratory Ruling Filed by Broadnet Teleservices, LLC*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 10654 (CGB 2015) (“Broadnet Public Notice”); *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by National Employment Network Association*, CG Docket No. 02-278, Public Notice, 29 FCC Rcd 11268 (CGB 2014).

<sup>13</sup> *RTI Public Notice* at 1 (emphasis added).

<sup>14</sup> See RTI Petition at 1.

<sup>15</sup> *Broadnet Public Notice* at 1-2.

NCLC did not comment on any of the three petitions or otherwise participate in this proceeding during the past two years. Moreover, NCLC has failed to demonstrate that good cause exists for this neglect, which is especially difficult to justify given that NCLC has filed comments on many other TCPA issues in this same FCC docket during the same two-year period.<sup>16</sup> NCLC has also met with a variety of Commission staff on numerous occasions during the same period to discuss other TCPA issues.<sup>17</sup>

Indeed, NCLC appears to take the position that the Commission is not authorized to complete a proceeding unless comments have been filed “by public interest groups representing consumers generally or by other legal aid programs representing low-income people.”<sup>18</sup> No such restriction applies to the Commission. Moreover, other consumers, such as Joe Shields and Frederick Luster, filed comments on the RTI, Broadnet, and NENA petitions.<sup>19</sup> Those comments raised many of the same issues and arguments as NCLC,<sup>20</sup> which means that those arguments therefore have already been raised and addressed by the Commission.

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<sup>16</sup> See, e.g., Reply Comments of NCLC *et al.*, CG Docket No. 02-278 (filed Dec. 22, 2014) (opposing a petition for declaratory ruling filed by the Consumers Bankers Association); Comments of NCLC *et al.*, CG Docket No. 02-278 (filed Feb. 23, 2015) (opposing a petition for declaratory ruling filed by the American Association of Healthcare Administrative Management); Comments of NCLC *et al.*, CG Docket No. 02-278 (filed June 6, 2016) (opposing a petition for declaratory ruling filed by Kohll’s Pharmacy and Homecare Inc.) .

<sup>17</sup> See, e.g., Letter from Margot Saunders, Counsel, NCLC, to Marlene Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Mar. 28, 2016).

<sup>18</sup> See NCLC Petition at 9.

<sup>19</sup> See, e.g., Comments of Joe Shields on the RTI International Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Dec. 23, 2014); Comments of Frederick Luster, CG Docket No. 02-278 (filed June 6, 2016).

<sup>20</sup> See *id.*; NCLC Petition.

### **III. THE *DECLARATORY RULING* IS SUPPORTED BY THE TCPA’S PLAIN LANGUAGE, LONGSTANDING ADMINISTRATIVE PRECEDENT, AND DECADES OF SUPREME COURT PRECEDENT.**

NCLC asserts that the *Declaratory Ruling* is “incorrectly reasoned” and inconsistent with both the TCPA and recent Supreme Court precedent.<sup>21</sup> In fact, however, the Commission’s clarification flows easily and naturally from the statute’s plain language, the FCC’s longstanding administrative precedent, and decades of Supreme Court precedent.

#### **A. The *Declaratory Ruling* is Consistent with the TCPA’s Plain Language.**

The TCPA’s plain language confirms that it does not apply to calls made by or on behalf of the federal government. Section 227(b)(1) makes it unlawful for a “person” to call wireless numbers using an automatic telephone dialing system (“autodialer”) or prerecorded voice in certain situations.<sup>22</sup> The Communications Act (in which the TCPA is codified) specifically defines a “person” as an “individual, partnership, association, joint-stock company, trust or corporation.”<sup>23</sup> The federal government does not meet this definition, and NCLC has not disputed otherwise. Moreover, as the Commission has explained, the fact that Congress chose not to include any language indicating an intent to subject the federal government to the TCPA’s technology-based calling restrictions is “conclusive evidence that Congress intended the federal government not to be included within the persons covered by [the prohibitions].”<sup>24</sup>

Similarly, federal contractors who place calls on behalf of the United States also are not “persons” in certain circumstances because of their relationship with the federal government. Such contractors “step into the shoes” of the federal government in these circumstances,

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<sup>21</sup> See *id.* at 3, 13-15; NCLC *et al.* Comments, CG Docket No. 02-278, 2-3 (filed Aug. 29, 2016) (“NCLC Comments”).

<sup>22</sup> See 47 U.S.C. § 227(b)(1).

<sup>23</sup> *Id.* § 153(39).

<sup>24</sup> See *Declaratory Ruling* ¶ 12.



including where they act “as the government’s agent in accord with the federal common law of agency.”<sup>25</sup> Because the calls are effectively “placed” by the federal government, the contractors who make them are exempt from liability to the same extent that the federal government would be if it had physically dialed the calls.

NCLC misconstrues the TCPA’s text, structure, and purpose when it claims that they “make clear” that Section 227(b) applies to contractors who are validly authorized to call on behalf of the federal government.<sup>26</sup> Congress could have easily defined “person” to include either the federal government or those who call on its behalf. It did not. NCLC also notes the Communication Act’s inclusion of the phrase “unless the context otherwise requires” in its definition of the term “person.” What NCLC fails to realize, however, is that this language actually works against its request. This is certainly a case where even if the federal government and its contractors were included in the definition of “person,” “the context otherwise requires” certain callers to not be “persons” due to their relationship with the United States.<sup>27</sup>

Moreover, the FCC has not “adopt[ed] a general exemption for classes of callers,” as NCLC suggests.<sup>28</sup> Rather, the FCC has clarified what an ambiguous term means in a statute it is charged with implementing. This clarification is consistent with Congress’ delegation of policymaking responsibilities to the Commission.<sup>29</sup> In fact, the Commission can use its authority under the Communications Act and the TCPA to not only interpret what “person” means and the

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<sup>25</sup> See *id.* ¶ 16.

<sup>26</sup> See NCLC Petition at 15.

<sup>27</sup> See 47 U.S.C. §153(39).

<sup>28</sup> See NCLC Petition at 17.

<sup>29</sup> See, e.g., *United States Telecom Assoc. v. FCC*, No. 15-1063, at 22-23 (D.C. Cir. 2016) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984)).

applicability of the TCPA to calls “on behalf of” the federal government, but also to clarify what “on behalf of” means in that context.<sup>30</sup>

**B. The *Declaratory Ruling* is Consistent with Longstanding FCC Precedent.**

The *Declaratory Ruling* is also consistent with “longstanding administrative precedent.” The Commission has consistently interpreted the TCPA to exempt from liability calls on behalf of a principal that would not have been liable if it had placed the calls itself.<sup>31</sup> For example, in the *1995 TCPA Order*, the FCC concluded that the statutory exemption from the term “telephone solicitation” for calls and messages “by a tax-exempt nonprofit organization” should include calls and messages made by or on behalf of tax-exempt nonprofit organizations.<sup>32</sup> In the *2003 TCPA Order* and the *2005 State Farm Declaratory Ruling*, the FCC reached similar conclusions in the context of the statutory exemption from the term “telephone solicitation” for calls and messages to persons with whom the caller has an established business relationship.<sup>33</sup> It would be entirely unreasonable to interpret the TCPA to protect parties placing telemarketing calls on behalf of private companies while offering no protection to parties placing non-telemarketing calls on behalf of the federal government for official government business.<sup>34</sup>

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<sup>30</sup> See, e.g., Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed July 18, 2016).

<sup>31</sup> See *id.* ¶ 17.

<sup>32</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391 ¶¶ 12-13 (1995).

<sup>33</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 ¶ 118 (2003); *Request of State Farm Mut. Auto. Ins. Co. for Clarification & Declaratory Ruling*, Declaratory Ruling, 20 FCC Rcd 13664 ¶¶ 1, 6 (CGB 2005); see also *Declaratory Ruling* ¶ 16 n.77.

<sup>34</sup> See also, e.g., *Request of ACA Int’l for Clarification & Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 559, 565 ¶ 10 (2008) (clarifying that “[c]alls placed by a third party collector on behalf of [a] creditor are treated as if the creditor itself placed the call”).

The Commission has likewise interpreted the TCPA to allow agency principles to support liability. For example, in the *2013 Dish Declaratory Ruling*, the Commission found that sellers could be held vicariously liable under the TCPA for calls placed on their behalf by third-parties.<sup>35</sup> Among other things, the Commission found that reading the statute to incorporate baseline agency principles “reasonably advance[s] the goals of the TCPA” and “is consistent with judicial precedent.”<sup>36</sup>

The *Declaratory Ruling* follows from these prior decisions. If a seller can be liable for calls that third parties place on its behalf, why could it not similarly delegate special benefits or privileges to the same third parties? As noted above, it would be entirely unreasonable to allow contractors to share a principal’s benefits if the principal is a private party, but not if the principal is the federal government. It would also be entirely unreasonable to impose more stringent restrictions on calls from contractors on behalf of the federal government than on calls from contractors on behalf of a private party.

**C. The *Declaratory Ruling* is Consistent with Decades of Supreme Court Precedent.**

Additionally, the *Declaratory Ruling* is consistent with decades of Supreme Court precedent, including the Court’s recent decision in *Gomez*.<sup>37</sup> As RTI and others have explained many times in this proceeding,<sup>38</sup> the Supreme Court consistently has held that statutes using the

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<sup>35</sup> *DISH Network, LLC*, Declaratory Ruling, 28 FCC Rcd 6574 ¶ 35 (2013).

<sup>36</sup> *See Id.* ¶¶ 35-36.

<sup>37</sup> *See Gomez*, 136 S. Ct. at 666.

<sup>38</sup> *See, e.g.*, Reply Comments of RTI, CG Docket No. 02-278, at 6 (filed Jan. 12, 2015) ; Letter from Mark W. Brennan, Counsel, RTI, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed July 18, 2016).

term “person” are “ordinarily construed to exclude” the federal government absent “some affirmative showing of statutory intent to the contrary.”<sup>39</sup>

The TCPA is devoid of any such “intent to the contrary.”<sup>40</sup> In fact, the Commission and members of Congress have both emphasized that the opposite is the case.<sup>41</sup> For example, in a January 8, 2015, letter to Chairman Wheeler, Representatives Butterfield, Ellmers, and Price explained that “the goal of the TCPA has never been to impede communications from the federal government.”<sup>42</sup>

The Court’s decision in *Gomez* reflects these realities. There, the Court expressly recognized that “[t]he United States and its agencies, it is undisputed, are not subject to the TCPA’s prohibitions.”<sup>43</sup> The Court also confirmed that federal contractors who “simply perform[] as directed” are, like the federal government and its agencies, “not subject to the TCPA’s prohibitions.”<sup>44</sup>

**D. NCLC Substantially Misconstrues the *Gomez* Decision and its Relationship to the *Declaratory Ruling*.**

Contrary to NCLC’s assertions, the Court did not hold that sovereign immunity “protects the government – and only the government.”<sup>45</sup> Rather, the Court that held federal contractors “may be shielded from liability” when they do not violate the government’s instructions, but that

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<sup>39</sup> See, e.g., *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Tribe*, 442 U.S. 653, 667 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941)).

<sup>40</sup> See *id.*

<sup>41</sup> *Declaratory Ruling* ¶12; Letter from Reps. David Price, G.K. Butterfield, and Renee Ellmers, U.S. Congress, to Chairman Tom Wheeler, FCC, CG Docket No. 02-278, at 1 (Jan. 8, 2015) (“Congressional Letter”).

<sup>42</sup> See Congressional Letter.

<sup>43</sup> *Gomez*, 136 S. Ct. at 663, 666, 672.

<sup>44</sup> See *id.*

<sup>45</sup> NCLC Comments at 12.

“[u]nlike the United States and its agencies, federal contractors do not enjoy absolutely immunity.”<sup>46</sup> In other words, sovereign immunity protects both the federal government and federal contractors, but the protection it affords to contractors is not always going to be as broad.<sup>47</sup>

The Commission also did not, as NCLC suggests, conflate the concept of sovereign immunity with the scope of the term “person” under the TCPA.<sup>48</sup> Rather, the Commission recognized that sovereign immunity and the interpretation of the TCPA are separate issues and made no finding concerning sovereign immunity.<sup>49</sup> Further, the Commission did not “base” the *Declaratory Ruling* on the *Gomez* decision.<sup>50</sup> Instead, the FCC observed that its decision is “supported by” the *Gomez* decision along with the text of the TCPA, other Supreme Court precedent, policy considerations, and the record in the proceeding.<sup>51</sup>

#### **IV. THE *DECLARATORY RULING* IS CONSTENT WITH THE BIPARTISAN BUDGET ACT’S AMENDMENTS TO THE TCPA.**

Contrary to NCLC’s claims, the FCC’s clarification in the *Declaratory Ruling* can easily be squared with last year’s amendments to the TCPA.<sup>52</sup> In a Report and Order released on August 11, 2016, the Commission adopted rules to implement the Bipartisan Budget Act amendments.<sup>53</sup> In the Report and Order, the Commission expressly rejected NCLC’s position

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<sup>46</sup> *Gomez*, 136 S. Ct. at 664.

<sup>47</sup> *See id.*

<sup>48</sup> *See* NCLC Petition at 13; NCLC Comments at 13.

<sup>49</sup> *See, e.g., Declaratory Ruling* ¶ 21.

<sup>50</sup> *See* NCLC Petition at 13.

<sup>51</sup> *See, e.g., Declaratory Ruling* ¶¶ 20-22.

<sup>52</sup> *See, e.g.,* NCLC Petition at 4.

<sup>53</sup> *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 16-99 (rel. Aug. 11, 2016).

that the *Declaratory Ruling* has limited its ability to adopt rules to implement the Bipartisan Budget Act amendments.<sup>54</sup>

Indeed, as the Commission has explained, the *Declaratory Ruling* does not mean that Congress' decision to exempt calls "to collect a debt owed to or guaranteed by the United States" was unnecessary."<sup>55</sup> For example, the clarification applies based on the relationship between the caller and the federal government, whereas the Bipartisan Budget Act exemptions apply based on the purpose of the call. A party who calls to collect a debt "owed to or guaranteed by" the U.S. may or may not be a federal contractor. Even if the party is a federal contractor, it may not be acting within the scope of an agency relationship with the federal government.

A petition for reconsideration recently filed by the Professional Services Council ("PSC") underscores this point.<sup>56</sup> According to PSC, the principal-agent relationship "is not common in the federal market."<sup>57</sup> If PSC is correct, then it would seem to follow that most of the parties who call to "collect a debt owed to or guaranteed by the United States" are not acting as agents of the federal government. And if this is the case, then Congress' recent exemptions (and the rules the Commission adopted to implement them) would be highly relevant to a wide variety of actors even if the term "person" in Section 227(b)(1) does not include the federal government and those authorized to call on its behalf.

Moreover, Congress passed the Bipartisan Budget Act before the FCC had released the *Declaratory Ruling*. This means that Congress' amendments to the TCPA were not "redundant

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<sup>54</sup> See *id.* ¶¶ 61-66; NCLC Petition at 16.

<sup>55</sup> See *Declaratory Ruling* ¶ 22 n.96.

<sup>56</sup> Petition for Reconsideration of Professional Services Council, CG Docket No. 02-278 (filed Aug. 4, 2016).

<sup>57</sup> See *id.* at 12, 15.

or pointless,” as the Commission has explained on multiple occasions.<sup>58</sup> Rather, Congress’ efforts “guarantee[d] that callers covered by the amendment would be excepted from the [TCPA’s] consent requirement no matter how the Commission eventually resolved the question.”<sup>59</sup>

## **V. NCLC GROSSLY EXAGGERATES THE POTENTIAL IMPACT OF THE DECLARATORY RULING**

NCLC claims that the *Declaratory Ruling* “will undoubtedly cause an immediate increase in the number of unwanted robocalls.”<sup>60</sup> NCLC also claims that “calls from debt collectors will likely also be increased.”<sup>61</sup> NCLC further claims that “[a]ll of the other protections of the TCPA, including the prohibitions against spoofing . . . will not apply.” These claims are unsubstantiated and rely on assumptions that fail to withstand scrutiny.

NCLC grossly exaggerates the *Declaratory Ruling*’s potential impact in a number of ways. For example, NCLC fails to acknowledge that the federal government itself could place the calls in question without liability.<sup>62</sup> Regardless of whether federal contractors are subject to the TCPA, federal government employees could place the calls while “conducting official government business.”<sup>63</sup> As the Supreme Court has explained, “the United States and its agencies . . . are not bound by the TCPA’s restrictions.”<sup>64</sup> Not even NCLC seriously contests

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<sup>58</sup> See, e.g., *Declaratory Ruling* ¶ 21 n.96.

<sup>59</sup> See *id.*

<sup>60</sup> NCLC Petition at 19.

<sup>61</sup> *Id.*

<sup>62</sup> See *id.*

<sup>63</sup> *Declaratory Ruling* ¶ 1.

<sup>64</sup> See *Gomez*, 136 S. Ct. at 663, 666.

this point, nor did it seek reconsideration of the Commission’s decision on the issue.<sup>65</sup> The federal government only uses contractors to place calls that could be placed by the federal government itself, which means that the federal government has no incentive to increase the number of calls it places based on the *Declaratory Ruling*. In short, the FCC’s clarification should not affect how many autodialed calls consumers receive.

NCLC also exaggerates the *Declaratory Ruling*’s potential impact by misconstruing the scope of the clarification. For example, NCLC claims that it will allow “[g]overnment contractors [to] make robocalls at any time of day or night” and ignore the “rules regarding technical and procedural standards for artificial voice calls [and] the prohibition against caller ID spoofing.”<sup>66</sup> However, the FCC plainly stated in the *Declaratory Ruling* that its clarification of the term “person” was limited to Section 227(b)(1).<sup>67</sup> “We make no finding here with respect to the meaning of ‘person’ as used elsewhere in the TCPA or the Communications Act,” the FCC explained.<sup>68</sup> The time-of-day, prerecorded voice, and spoofing rules NCLC references are not grounded in Section 227(b)(1).<sup>69</sup> The clarification thus has no bearing on these requirements or on any party’s obligations to comply with them.

Additionally, NCLC exaggerates the *Declaratory Ruling*’s potential impact by assuming that the protections afforded by it are fundamentally different than those enjoyed by contractors

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<sup>65</sup> A footnote in the NCLC Petition notes merely that NCLC does “not concede . . . that the federal government is not a ‘person’ under the TCPA.” NCLC Petition at 13 n.37.

<sup>66</sup> *Id.* at 4, 11.

<sup>67</sup> See *Declaratory Ruling* ¶ 13 (“We emphasize that our interpretation of ‘person’ as excluding the federal government is limited to the specific statutory provision before us: section 227(b)(1) of the Communications Act.”).

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., 47 U.S.C. 227(d)(3) (prescribing restrictions that apply to “all artificial or prerecorded telephone messages”); 47 C.F.R. § 64.1604 (prohibiting spoofing).



under derivative sovereign immunity. Derivative sovereign immunity is different, NCLC argues, because it allows federal contractors to “be ordered to comply with the TCPA going forward.”<sup>70</sup> However, the same can be said about the FCC’s clarification. Under it, only those contractors who act within the scope of agency relationships with the federal government are not “persons,” which means that the federal government can at any time require its contractors to comply with the TCPA by tailoring the scope of its agency relationships.

Moreover, although NCLC claims that “[t]he terms of government contracts are often kept secret from the public absent Freedom of Information Act (“FOIA”) requests,”<sup>71</sup> most federal government Requests for Proposals (“RFPs”) are readily available to the public. Regardless, under the Commission’s decision, plaintiffs would still seem to have at least as permissive a standard for bringing private TCPA claims against federal contractors (and obtaining the final federal contracts) as they would for bringing other private claims, such as tort or contract claims, against the same federal contractors.

It is important to remember that the *Declaratory Ruling* has not altered any legal rights or obligations under the TCPA, the Commission’s TCPA rules, or any other federal law. The Commission did not modify its rules or otherwise “create exemptions from the TCPA’s requirements,” as NCLC suggests.<sup>72</sup> Instead, the Commission clarified the meaning of an ambiguous term in the statute. The term “person” in Section 227(b)(1) does not include the federal government or agents validly authorized to make calls on its behalf, and it did not include such entities even prior to the *Declaratory Ruling*. The FCC’s decision confirmed the term’s meaning. It did not change it.

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<sup>70</sup> See NCLC Petition at 14.

<sup>71</sup> See *id.*

<sup>72</sup> See, e.g., NCLC Petition at 6, 17

**VI. THE *DECLARATORY RULING* ADVANCES THE PUBLIC INTEREST AND BENEFITS THE FEDERAL GOVERNMENT AND CONSUMERS.**

**A. The Federal Government and its Contractors Must Be Able to Call Wireless Phones to Ensure that Official Government Research, Funding, and Policies Benefit Citizens as Intended.**

The TCPA’s “prior express consent” requirement for non-marketing calls applies only to calls to wireless numbers.<sup>73</sup> More and more households, however, have “cut the cord” and use only wireless telephones. Low-income and minority households, as well as those younger than 30 years old, are increasingly less likely to have a landline telephone.<sup>74</sup> If the federal government and its contractors could not call wireless phones, they would be unable to reach an increasing number of households, and they would have disproportionately less contact with certain demographics. For example, RTI has explained that many of its research surveys “require random sampling to be useful” and that “key demographic populations, such as adults aged 18-34 and those living in poverty, would be underrepresented if researchers could only contact residential telephone numbers.”<sup>75</sup>

Without appropriate input from such citizens, government-funded research – and the policies that it shapes – would not be able to adequately address the issues that affect them. For instance, RTI has conducted surveys regarding intimate partner violence on behalf of the federal government.<sup>76</sup> These studies showed that women in lower-income households are significantly

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<sup>73</sup> See 47 U.S.C. § 227(b)(1); 47 C.F.R. § 64.1200(a).

<sup>74</sup> See Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2015*, NAT’L CTR. FOR HEALTH STATISTICS (May 2016), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201605.pdf> (finding that the percentage of U.S. households with only mobile phones grew to 48.3 percent in the second half of 2015).

<sup>75</sup> Reply Comments of RTI International, CG Docket No. 02-278, at 7-8 (filed Jan. 12, 2015).

<sup>76</sup> RTI International, *Research on Intimate Partner Violence and Sexual Violence*, [http://www.rti.org/sites/default/files/brochures/ipv\\_sv.pdf](http://www.rti.org/sites/default/files/brochures/ipv_sv.pdf) (last visited Aug. 3, 2016).

more likely to experience violence than women in wealthier households.<sup>77</sup> If studies such as this do not accurately reflect the scope of the issues because affected individuals are not contacted, the policies they influence cannot effectively address the issue.

Similarly, the *Declaratory Ruling* helps ensure that wireless consumers are equally able “to participate in government and make their views known to their representatives,” as the FCC explained.<sup>78</sup> It will also “foster public safety and save resources by allowing government to use the most cost-efficient method of communicating with the public.”<sup>79</sup> As an example, if the contractors working on behalf of the Social Security Administration (“SSA”) were subject to the TCPA’s “prior express consent” requirement, it would be “more difficult and costly to inform disabled or injured Americans of incentives that allow them to attempt to return to work without risking benefits.”<sup>80</sup>

**B. The Federal Government’s Use of Advanced Calling Technologies and Contractors is Cost-Effective, Efficient, and Consistent with Sound Federal Policy.**

The calls described above, as the Commission has acknowledged, “advance important congressional objectives” whether they are placed by the federal government itself or contractors who call on its behalf.<sup>81</sup> Meanwhile, it is normally more cost-effective for federal agencies to use contractors for projects that require calling than to hire more federal government

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<sup>77</sup> American Psychological Association, *Violence and Socioeconomic Status*, <http://www.apa.org/pi/ses/resources/publications/violence.aspx> (last visited Aug. 3, 2016).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; see also, e.g., Congressional Letter at 1.

<sup>80</sup> *Declaratory Ruling* ¶ 19.

<sup>81</sup> *Id.* ¶ 4 (citing RTI Reply Comments, CG Docket No. 02-278, at 6-7 (filed Jan. 12, 2015); Marketing Research Association Comments, CG Docket No. 02-278, at 3-4 (filed Dec. 23, 2014)).

employees.<sup>82</sup> Thus, allowing the federal government and contractors who call on its behalf to use autodialers without consent “will foster public safety and save public resources by allowing government to use the most cost-efficient method of communicating with the public.”<sup>83</sup>

Meanwhile, NCLC oversimplifies the federal government’s calling options. It argues that the TCPA “does not prevent government agencies from making regularly dialed calls staffed by humans.”<sup>84</sup> This statement, however, overlooks major challenges that the federal government and its contractors would face when attempting to comply with the TCPA’s technology-based restrictions. Since the release of the FCC’s June 2015 *Omnibus TCPA Order*,<sup>85</sup> there has been considerable uncertainty about what constitutes an “autodialer” under the TCPA, and some parties seem to argue that anything other than a rotary phone qualifies as an autodialer. It is therefore entirely unclear which calling methods and technologies the TCPA would prevent federal agencies from using to call wireless phones.

Moreover, the *Declaratory Ruling* does not provide federal contractors with a “get-out-of-jail free card,” as NCLC suggests.<sup>86</sup> Instead, the Commission’s clarification is limited to situations in which a contractor placed calls with authority that has been validly conferred on it

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<sup>82</sup> It is a longstanding federal government policy to rely on the private sector for certain needed commercial services. See, e.g., Office of Management and Budget, Circular A-76, *Performance of Commercial Activities* (2003), available at <http://bit.ly/29UNmO3> (agencies should “rely on the private sector for needed commercial services” assuming such services are not “inherently governmental” functions).

<sup>83</sup> *Declaratory Ruling* ¶ 19.

<sup>84</sup> See NCLC Petition at 11.

<sup>85</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 ¶¶ 15-18 (2015) (declining to “address the exact contours of the ‘autodialer’ definition”).

<sup>86</sup> See NCLC Petition at 17.

by the federal government.<sup>87</sup> Federal agencies can control the scope of this authority and, with it, what calls contractors can place without being subject to the TCPA's "prior express consent" requirement.

## **VII. CONCLUSION.**

For the reasons discussed above, the Commission should deny NCLC's petition for reconsideration of the *Declaratory Ruling*.

Respectfully submitted,

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<sup>87</sup> See *Declaratory Ruling* ¶¶ 12-19.

## CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2016, a copy of the foregoing Opposition to Petition for Reconsideration was sent via electronic mail and first class mail to the following:

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